

29129
EB

SERVICE DATE - LATE RELEASE APRIL 23, 1998

SURFACE TRANSPORTATION BOARD

No. 41670

SHELL CHEMICAL COMPANY and SHELL OIL COMPANY
v.
BOSTON & MAINE CORPORATION, ET AL.

Decision No. 25

Decided: April 22, 1998

This decision addresses defendants' petition (filed February 26, 1998) for an order to take depositions upon oral examination,¹ and complainants' reply (filed March 18, 1998).²

BACKGROUND

By complaint filed December 24, 1995, complainants allege that numerous railroads are charging unreasonable rates on complainants' shipments of polyethylene terephthalate (PET) from/to Apple Grove, WV. See Decision No. 19, slip op. at 1. Defendants requested that the proceeding be bifurcated into separate market dominance and rate reasonableness phases, see Decision No. 19, slip op. at 2, and the parties initiated discovery on market dominance alone.

¹ There are 15 remaining defendants: Boston & Maine Corporation (B&M); Buffalo & Pittsburgh Railroad, Inc. (B&P); CSX Transportation, Inc. (CSX); Gateway Western Railway Company (GWWR); Great Walton Railroad Company, Inc. (GWRC); Illinois Central Railroad Company (IC); Indiana Harbor Belt Railroad Company (IHB); Louisville & Indiana Railroad Company (L&I); Modesto and Empire Traction Company (M&E); Providence and Worcester Railroad Company (P&W); Salt Lake, Garfield and Western Railway Company (SLG&W); South Carolina Central Railroad Company, Inc. (SCC); ST Rail System (ST); The Columbus & Ohio River Rail Road Company (C&OR); and Washington Central Railroad Company, Inc. (WCRC). See Decision No. 24, slip op. at 1 n.1. The petition filed by defendants on February 26, 1998, was apparently filed on behalf of all of the then 16 remaining defendants except GWWR (the "non-litigating" defendant) and IHB, L&I, and WCRC (the "held in abeyance" defendants). See Decision No. 19, slip op. at 2 n.7 (status of GWWR) and 3 n.14 (status of IHB, L&I, and WCRC).

² The two complainants are Shell Chemical Company and Shell Oil Company (referred to collectively as complainants or Shell). See Decision No. 19, slip op. at 1 & n.3.

Extensive written discovery has been undertaken by the parties on the market dominance issue. Thus far, only complainants have taken depositions.³ However, defendants indicated on several occasions that, once certain pending discovery issues were resolved, they would seek to depose several Shell officers and employees.

Those other discovery issues have now been resolved. Thus, by letter dated January 16, 1998, defendants notified complainants of the individuals that defendants intended to depose, and, on January 23, 1998, defendants served complainants with a notice of taking depositions upon oral examination, indicating the dates, time, and place of the depositions. By letter dated January 30, 1998, complainants objected to the depositions. Defendants thereafter filed their petition for an order to take depositions upon oral examination, to which complainants replied.

PERSONS WHOM DEFENDANTS SEEK TO DEPOSE

The six persons sought to be deposed by defendants are: Roger Fowler, Morris Medley, Brian Felker, Fred Fournier, Ron Epperson, and David Hall. Defendants state that three of these individuals — Mr. Fowler, Mr. Medley, and Mr. Felker — are or were employed in the Shell Transportation Department, and, in their professional capacities, interacted with the railroads concerning the transportation of PET. Mr. Fournier, they say, is a business manager for PET, who is responsible for overseeing the PET business, and who has been involved in the marketing of PET from Apple Grove for Shell since Shell purchased the Apple Grove facility in 1993. Mr. Epperson, according to defendants, is Mr. Fournier's counterpart for a new resin product that Shell is developing known as CORTERRA, which is very similar to PET; Mr. Epperson participated in discussions with CSX concerning CSX's rate proposal for siting this new business at Apple Grove. Finally, defendants state that Mr. Hall, a consultant, has been integrally involved with several of the issues in this proceeding. In defendants' view, it is reasonable to expect that each of these individuals has information respecting the transportation options that Shell has through siting of plants or use of alternate sources.

Complainants oppose the depositions, asserting generally that defendants have not identified, in any detail, the facts they seek to establish and the substance they seek to elicit. In complainants' view, depositions are not needed because the sought information can be obtained through other means, such as supplemental interrogatories. Complainants also suggest that defendants have waited too long to call these witnesses. Finally, they argue that Mr. Epperson is not knowledgeable as to the transportation at issue here, that Mr. Hall is a consultant and not an employee of Shell, and that Mr. Medley has retired and is thus beyond Shell's reach.

³ Complainants have deposed five CSX representatives, and arrangements have been made for a deposition to be taken by complainants of a sixth CSX representative.

DISCUSSION AND CONCLUSIONS

The six individuals whom defendants seek to depose appear to have first-hand knowledge of facts that may be material to the market dominance determination in this proceeding, and defendants' requests for depositions were made promptly after the other pending discovery issues were resolved. Therefore, we will permit the depositions to go forward.⁴

However, we are concerned that defendants' depositions not turn into what complainants describe (Reply, at 3) as an effort simply "to troll in the recollections of knowledgeable persons to see what they might come up with that may be of aid to [defendants'] case." In FMC Wyoming Corp. and FMC Corp. v. Union Pacific Railroad Co., STB Docket No. 42022 (STB served Apr. 17, 1998) (FMC), we pointed out that the defendant railroad has "both the burden to identify [product and geographic] competition and to prove that it is effective." To prevent a railroad from attempting to shift the burden of identifying product and geographic competition back to the shipper through the discovery process, we held that a railroad is entitled to discovery on matters relating to product and geographic competition only if it "(1) first identifies, with specificity, the product and geographic competition it asserts is effective; (2) explains the basis for that assertion (so as to ensure against use of discovery requests as a fishing expedition); and (3) narrowly tailors its discovery requests to information needed to assist in proving the effectiveness of the specific competition that it has identified."

In their petition for an order directing depositions — which was filed before our decision in FMC — defendants suggest (at 7) that they may seek to question Shell personnel broadly on what they know and on "the basis on which Shell alleges that Defendants have market dominance over the transportation of PET."⁵ This type of questioning could violate our directive in FMC. Therefore, we admonish defendants that, as they conduct their depositions, they must follow the

⁴ The fact that Mr. Hall is a consultant and not an employee does not provide a basis for denying defendants the opportunity to depose him. He has been retained by complainants, and continues to be retained by complainants, to consult on some of the issues involved in this proceeding; indeed, complainants have held open the possibility that Mr. Hall may provide testimony in the case. And although Mr. Medley has retired, and hence is not subject to the "control" of his (former) employer, we ask complainants to make the same efforts to produce him that they would make if they themselves were sponsoring his testimony.

⁵ See also id. at 8 ("it is reasonable to expect that [the prospective deponents] also have information about the transportation options that Shell has through siting of plants or use of alternate sources"); id. at 10 (other prospective deponents know about Shell's decisionmaking process with respect to the siting of new businesses and transportation of PET by other modes and from other sources).

guiding principles set forth in FMC. The deponents need not answer any questions that do not meet the criteria for permissible discovery set out in FMC.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Subject to the directives given in this decision and in FMC, defendants' petition for an order to take depositions upon oral examination is granted.

2. Complainants are directed to make the six named individuals available for depositions.

3. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary